Supreme Court, U.S.
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No. 02-1689

IN THE

# Supreme Court of the United States

GRUPO DATAFLUX,

*Petitioner*,

*v.*

ATLAS GLOBAL GROUP, L.P., OSCAR ROBLES-CANON, and FRANCISCO LLAMOSA,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## REPLY BRIEF

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## CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

## TABLE OF CONTENTS


| | Page |
|---|---|
| CORPORATE DISCLOSURE STATEMENT ..... | i |
| TABLE OF CONTENTS ..... | ii |
| TABLE OF CITED AUTHORITIES ..... | iii |
| REASONS FOR GRANTING THE PETITION ... | 1 |
| I. The Respondents Confirm That a Circuit Split Exists ..... | 1 |
| II. *Caterpillar* Does Not Authorize the Fifth Circuit's New Exception to the Longstanding Limits on Diversity Jurisdiction ..... | 2 |
| III. The Fifth Circuit's Unworkable New Exception to the Longstanding Limits on Diversity Jurisdiction Undermines Fundamental Public Policy Interests ..... | 3 |
| CONCLUSION ..... | 4 |




## TABLE OF CITED AUTHORITIES

**CASES**


| | Page |
|---|---|
| *Atlas Global Group, L.P. v. Grupo Dataflux*, 312 F.3d 168 (5th Cir. 2002) ..... | 2 |
| *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996) ..... | 2 |
| *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) ..... | 3 |
| *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997) ..... | 1, 2 |

## REASONS FOR GRANTING THE PETITION

### I. The Respondents Confirm That a Circuit Split Exists

The Respondents confirm that a clear circuit split exists between the Fifth Circuit's decision in this case and the D.C. Circuit's decision in *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997). The Respondents contend that *Saadeh* is not persuasive and urge this Court "to reject *Saadeh*." Brief in Opposition, pp. 8-9. That, however, is an argument in favor of granting Dataflux's petition for writ of certiorari so that this Court can analyze the merits of the conflicting holdings in the two cases and announce a clear rule.[1]

Given the undisputed circuit split regarding a party's ability to create retroactive diversity jurisdiction by unilaterally changing its citizenship, Dataflux's petition for writ of certiorari should be granted and this important issue should receive the benefit of full briefing on the merits. The issue has been resolved differently by these circuits, and a clear answer regarding *Caterpillar*'s scope is needed. Allowing this split to remain unresolved and jurisdictional rules to become muddled does not serve any useful purpose.

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1. As shown in Dataflux's petition for writ of certiorari, the Fifth Circuit's decision also directly conflicts with numerous decisions holding that a party's unilateral change in citizenship after litigation has commenced cannot retroactively create diversity jurisdiction that did not exist at the time suit was filed. Pet. for Writ of Cert., pp. 12-13 n.2.

## II. *Caterpillar* Does Not Authorize the Fifth Circuit's New Exception to the Longstanding Limits on Diversity Jurisdiction

In contrast with the Fifth Circuit, the D.C. Circuit in *Saadeh* properly refused to extend *Caterpillar* beyond its context to allow a party to create retroactive diversity jurisdiction by unilaterally changing its citizenship after suit is filed. *Saadeh*, 107 F.3d at 56-57. The D.C. Circuit (and Judge Garza in dissent) correctly recognized that such a broad exception effectively creates a new rule in direct conflict with the longstanding rule requiring diversity jurisdiction to be determined based on the parties' citizenship and circumstances at the time suit is filed. *Id.*; *see also Atlas Global Group, L.P. v. Grupo Dataflux*, 312 F.3d 168, 175 (5th Cir. 2002) (Garza, J., dissenting).[2]

The Respondents erroneously suggest that the Fifth Circuit's expansive interpretation of *Caterpillar* somehow prevents jurisdictional manipulation by unscrupulous defendants. Brief in Opposition, p. 6. According to the Respondents, a defendant could delay asserting a challenge to a district court's subject matter jurisdiction until after the defendant learns the jury's verdict. *Id.* If the defendant does not like the jury's verdict, it could then "unwind the entire case" by objecting to the court's jurisdiction before judgment is entered. *Id.*

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2. Even the panel majority in this case acknowledged, albeit in an understated fashion, that its holding expanded this Court's holding in *Caterpillar*. *Atlas Global Group, L.P.*, 312 F.3d at 173 ("However, our holding today has only a slightly greater effect on the general rule than would the strictest construction of *Caterpillar*.").



The Respondents' argument fails because it is black-letter law that parties cannot consent to a court's subject matter jurisdiction if it does not exist and parties cannot waive their right to challenge a court's subject matter jurisdiction. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings."). Furthermore, a far greater risk of manipulation is created by the Fifth Circuit's new rule, which allows a plaintiff to sue first and worry about establishing federal jurisdiction later.

## III. The Fifth Circuit's Unworkable New Exception to the Longstanding Limits on Diversity Jurisdiction Undermines Fundamental Public Policy Interests

The Respondents cannot plausibly contend that the Fifth Circuit's decision serves public policy concerns by preventing "inconsistent factfindings." Brief in Opposition, p. 11. The Respondents overlook the fact that all federal courts, including federal appellate courts, already have the authority – and the duty – to dismiss a case at any stage of the litigation (post-verdict or otherwise) when subject matter jurisdiction does not exist. *Ins. Corp. of Ireland, Ltd.*, 456 U.S. at 702 ("[A] court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion.").

Even if a case is dismissed for lack of subject matter jurisdiction after a jury has reached a verdict, a second trial resulting in a different verdict does not create "inconsistent

factfindings." Once the original case is dismissed for lack of jurisdiction, the original jury verdict becomes a nullity. A verdict in a case that is retried after being dismissed for lack of subject matter jurisdiction does not create "inconsistent factfindings" any more than does a verdict in a case retried after an appellate court remands for a new trial.

## CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted. The judgment of the court of appeals should be reversed, and judgment should be rendered dismissing this case for lack of subject matter jurisdiction.

Respectfully submitted,

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